

HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL
MORTGAGE BACKED SECURITIES
LITIGATION

This Document Relates to: ALL CASES

Master Case No. 2:09-cv-00037-MJP

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO SEAL
EXHIBITS TO THE SUPPLEMENTAL
YOU DECLARATION**

**NOTED ON MOTION CALENDAR:
August 26, 2011**

I. INTRODUCTION

Plaintiff Boilermakers National Annuity Trust (“Boilermakers”) files this response to Defendants’ Motion to Seal Exhibits to the Supplemental You Declaration (“Supplemental You Declaration”) (Dkt. No. 304). Plaintiff requests that the Court issue an Order sealing Exhibits A and B to the Supplemental You Declaration. These Exhibits contain information that is subject to protection under the Stipulated Protective Order and Stipulated Order (“Protective Order”) the Court has entered in this case (Dkt. No. 213).

II. STATEMENT OF FACTS

On August 12, 2011, Defendants filed a supplemental declaration in support of their motion to compel the production of certain documents from Boilermakers. That declaration

attached three exhibits. Exhibit A is an excerpt of a report produced by Plaintiff's third-party investment consultant, Callan & Associates ("Callan Report"). Exhibit B is an excerpt from a report produced by Plaintiff's third-party investment manager, McMorgan & Company ("McMorgan Report").¹ Each of these exhibits references many securities investments made by Plaintiff other than the WaMu 2006-AR7 Certificates at issue in this litigation. This information is confidential information that, if publicly disclosed, could be detrimental to Plaintiff's ongoing business practices. Plaintiff now responds to Defendants' motion to seal also seeking to seal these exhibits that contain this confidential proprietary information. Because good cause exists to seal these documents, Plaintiff respectfully requests that the Court grant the motion to seal.

III. ARGUMENT AND AUTHORITY

A. Standard of Review

The Court has authority to seal documents, or portions of documents, that contain confidential or highly sensitive information. The Protective Order and LR 5(g)(3) provide that a party must obtain the Court's authority to file documents under seal by filing a motion to seal. There are two standards that govern motions to seal. *See* LR 5g(2).

Fed. R. Civ. P. 26(c) provides that “a trial court may grant a protective order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Where a party is seeking to seal documents pursuant to Rule 26(c), typically documents attached to non-dispositive discovery motions such as the underlying motion to compel here, that party need only show that good cause exists to protect the information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality. *Pintos v. Pac. Creditors Assoc.*, 605 F.3d 665, 678 (2010) (citing *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)). Such non-dispositive motions are “often unrelated, or only tangentially related, to the underlying cause

¹ Plaintiff has no objection to the unsealing of Exhibit C.

1 of action, and, as a result, the public's interest in accessing dispositive materials does not
 2 apply with equal force to nondispositive materials." *Id.* Alternatively, to seal documents
 3 attached to a dispositive motion, such as a summary judgment motion, the movant must meet
 4 a "compelling reasons" standard. *See Kelley v. Microsoft Corp.*, No. cv-00475-MJP, Dkt.
 5 129. *See also Pintos*, 605 F.3d at 678 (citing *Kamakana v. City & County of Honolulu*, 447
 6 F.3d 1172, 1178-79 (9th Cir. 2006) (internal quotation marks and citations omitted)).²

7 **B. Good Cause Exists to Seal Exhibits A and B to the Supplemental You Declaration**

8 The law "gives district courts broad latitude to grant protective orders to prevent
 9 disclosure of materials for many types of information, including, but not limited to, trade
 10 secrets or other confidential research, development, or commercial information." *Phillips v.*
 11 *GMC*, 307 F.3d at 1211 (citing Fed. R. Civ. P. 26(c)(7)). Information concerning the value
 12 of Plaintiff's investment portfolio and rates of return on irrelevant securities investments
 13 made by Plaintiff's investment manager on Plaintiff's behalf is information that was
 14 compiled by Plaintiff and its third-party investment advisors during the normal course of
 15 Plaintiff's, McMorgan's and Callan's businesses. *See Carpenter v. U.S.*, 484 U.S. 19, 26,
 16 108 S. Ct. 316 (1987) (holding that "[c]onfidential information acquired or compiled by a
 17 corporation in the course and conduct of its business is a species of property to which the
 18 corporation has the exclusive right and benefit"). *See also Selling Source, LLC v. Red River*
 19 *Ventures, LLC*, 2011 U.S. Dist. LEXIS 49664 (D. Nev. Apr. 29, 2011) (holding that good
 20

21 ² Under the "compelling reasons" standard, a district court must weigh "relevant factors," base its decision "on
 22 a compelling reason," and "articulate the factual basis for its ruling, without relying on hypothesis or
 23 conjecture." *Id.* at 679 (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). Courts in the
 24 Ninth Circuit have considered the following factors in determining whether compelling reasons exist to warrant
 25 sealing records: (1) the public's interest in understanding the judicial process; (2) whether disclosure of the
 26 material at issue could result in improper use (such as to incite scandal, libel a party, or enable infringement of a
 27 party's trade secrets); (3) the interests of the parties, and the balance of equities; and (4) the duty of the court to
 balance all of these competing interests and to inform the public of the basis for its decision. *See California ex
 rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1115 (C.D. Cal. 2005) (citing *Nixon v. Warner Comm'n,*
Inc., 435 U.S. 589, 602-04, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); *Hagestad*, 49 F.3d at 1434; *Valley Broad.
 Co. v. U.S. District Court*, 798 F.2d 1289, 1294 (9th Cir. 1986)) (finding in the context of a labor dispute that
 consideration of these factors as well as "the national labor policy" were relevant in evaluating a non-party's
 motion to seal exhibits containing personal financial information).

1 cause existed to seal documents concerning Selling Source's propriety business operations
 2 and trade secrets). The public disclosure of this information could subject Plaintiff,
 3 McMorgan and Callan to annoyance, embarrassment, oppression, or undue burden or
 4 expense from third-party competitors and others who may obtain their confidential business
 5 records. As a result, good cause exists for it to be sealed.

6 **C. Even if a Compelling Reason Standard is Applied, Such Reasons Exist to Seal
 Portions of Exhibit A and B.**

7 “It is well-settled that the court has the authority to shield proprietary information
 8 related to the ongoing operations of a business from public review. *Selling Source*, 2011
 9 U.S. Dist. LEXIS 49664 (D. Nev. Apr. 29, 2011). In *Selling Source*, faced with a motion to
 10 seal discovery documents and deposition transcripts that related to the Defendant’s business,
 11 the court held that, “most of the material consists of detailed information regarding the
 12 parties’ business operations, customer agreements, corporate structure, the details of Selling
 13 Source’s customer base and how the company works with and licenses products to its
 14 customers and measures it takes to protect its intellectual property. Based on the content of
 15 this material, the parties’ interest in protecting their trade secrets and proprietary business
 16 practices outweighs the general public interest in public filings.” *Selling Source*, 2011 U.S.
 17 Dist. LEXIS 49664 at *5. *See* the Declaration of Kenneth M. Rehns in Response to
 18 Defendants’ Motion to Seal Exhibits to the Supplemental You Declaration (“Rehns
 19 Declaration”).

20 The proposed sealing of confidential information discussed in the Callan and
 21 McMorgan Reports includes information regarding investments that are not at issue in this
 22 litigation. This information constitutes proprietary information that should be shielded from
 23 disclosure. Public disclosure of this information could further subject Plaintiff and its third
 24 party investment advisors McMorgan and Callan to the risk that this information will be used
 25 improperly by third-party competitors.

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1 **D. Sealing These Documents Will Not Hamper the Public's Understanding of the**
Judicial Process

2 Moreover, other “relevant factors” warrant sealing this information. First, sealing the
 3 non-public investments of Plaintiff will neither hamper nor threaten the public’s interest in
 4 understanding the judicial process. Indeed, the proposed redactions seek to seal information
 5 concerning only those securities investments that are not at issue in this litigation. Further,
 6 the other documents that have been filed provide a wealth of information regarding the issues
 7 in this case. The sealing of irrelevant portions of just two exhibits does not negatively impact
 8 the public’s interest.

9 Continued access to the other exhibits filed in this case will ensure that the public is
 10 able to review and assess the information most relevant to this case. The public’s interest in
 11 understanding the claims and defenses in this case and, ultimately, the public’s interest in
 12 understanding the judicial process by which those claims and defenses will be evaluated, will
 13 not be impaired if the Court grants this motion.

14 **E. Disclosure of This Information Could Result in Improper Use**

15 Furthermore, information regarding Boilermakers’ securities investments could be
 16 used against Plaintiff, McMorgan and Callan by competitors, the potential of which should
 17 be considered in determining whether compelling reasons exist to seal documents. Plaintiff
 18 seeks to prevent the possibility of other entities misusing, manipulating, or otherwise
 19 exploiting this information to the detriment of Boilermakers and its third-party investment
 20 advisors.

21 **F. Neither the Parties’ Interests Nor a Balancing of the Equities Precludes Sealing**
This Information, and the Court Must Balance These Competing Interests and
Inform the Public of the Basis for its Decision

22 Finally, Plaintiff’s interest in protecting this information outweighs those interests of
 23 the public. The information Plaintiff seeks to seal has little probative value as to the issues
 24 raised in this case, and sealing this information will not impede the public’s ability to
 25 independently assess the case. As previously discussed, continued access to other exhibits
 26 filed in this matter will ensure the public’s interest is adequately protected.

IV. CONCLUSION

Exhibits A and B to the Supplemental You Declaration should be sealed because good cause and compelling reasons exist to keep this information confidential. Proposed redactions to Exhibits A and B to the You Declaration for public filing are attached as Exhibits A and B to the Rehns Declaration submitted herewith.

Dated: August 22, 2011

Respectfully submitted,

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I hereby certify that on August 22, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record and additional persons listed below:

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